

EUGENE MACNAMEE

GIRLS AND BOYS

ABSTRACT. Transsexuality recently burst once more upon the legal scene when the European Court of Human Rights found UK law denying transsexuals a new ‘gender re-aligned’ birth certificate to be in breach of their right to privacy. The topic of transsexuality has cropped up in various guises as a troublesome legal issue, both nationally and internationally, in the last thirty years or so. The primary trouble is that most legal systems are based around implicit assumptions as to sexual identity, which legal judgments on transsexual issues make explicit. The very making of judgments on questions such as “what is a man or woman” creates an ongoing paradox of uncertainty as to the answer, for if sexual identity has to be legally defined then what status does it have as a moral or natural phenomenon? Such paradoxes are often resolved by pointing to some proposed point of legal originality or revolution beyond which, it is claimed, there is no need to look. This article looks at the case of *Corbett v Corbett*, the founding case for law on transsexuality in the UK, which denied marriage rights to transsexuals because they were not of “opposite biological sex” and provoked the passage of the Marriage Act 1971, which maintained this wording as a restriction on who could marry. The article examines the formal construction of the judgment in this case, and how legitimacy was sought for an eventual pronouncement on sexual identity. It seeks, therefore, to lay bare the founding moment of law on transsexuality in the UK, in all its paradoxical self-concealing ignominy.

KEY WORDS: gender-realignment, heterosexuality, marriage, scientific evidence, transsexuality

Alcibiades: What is a man?

Socrates: I don’t know what to say.¹

When confronted with abstract questions of human nature, such as “what is a man?”, it is useful to have a human institution, which narrows the question into more manageable dimensions. The law often provides such a question-narrowing function, coupled to a definitive answer as to what is what. Recently the European Court of Human Rights has found that the standard United Kingdom law of sexual classification as regards birth certificate provision is in breach of the right to privacy under the European Convention on Human Rights. The United Kingdom is now obliged to change its law so that transsexuals can be issued a birth certificate reflecting a post-operative gender identity. The various other anomalies

¹ Plato, *The Symposium: The Collected Dialogues of Plato Including the Letters* (Princeton: Princeton University Press, 1961).



that characterise the treatment of transsexuals in UK law, for example that they cannot marry in their new gender, that they will be imprisoned within an institution according to their pre-operative sex, must surely come under review, given this latest decision. It seems meet at this point to examine how things came to this legal pass, in relation to transsexuals, and to see if there are any clues as to how they might be resolved. This article first opens the theoretical question of what it is to be a man or woman through looking at issues of transsexuality, transgender and 'queer' sexual politics. It then analyses at some length the United Kingdom law case of *Corbett v Corbett* as an illustration of the means by which the legal institution goes about its task of narrowing grand and abstract questions to manageable size and materiality.² In this case, which decided the validity of a purported marriage ceremony, the law, incarnated in the shape of Ormrod J, was able to provide a simple answer to the trying question of what it is to be a woman. It was an answer based entirely on 'sex'. Usefully, Ormrod J also provided a definition of 'sex' as "natural heterosexual intercourse". Before chasing definitions one step further along the line and asking ourselves what did he mean by 'natural', 'heterosexual' or 'intercourse', let us promise ourselves that these questions will indeed be addressed in due course. The answers and the judicial techniques used to reach them will be measured against some contemporary legal theory on matters of legality and sexuality. Such a process, of course, goes in the opposite direction to the question-narrowing function of the law that seeks to take single answers and subject them to many questions. This process, however, is legitimated by another singular question, and that is the potentially embarrassing question of whether the legal institution does justice. This question may be regarded as entirely singular to the parties involved in the case, but the broader and more necessary question goes to the capacity of the legal institution to provide justice generally in relation to matters of, for want of a better general term, love.

TRANSSEXUALITY AND THE LAW

Transsexuals and (to a lesser extent) transvestites raise the question of gender in its most acute form. In this sense they are the exposed nerve of the 'gender problem' and in respect of which the law has failed to give a positive and tolerant response.³

The National Health Service in the United Kingdom each year provides several hundred people with 'gender-reassignment surgery'. It is recog-

² *Corbett v Corbett* [1971] 3 All ER 253.

³ P. Crane, *Gays and the Law* (London: Pluto Press, 1984), 188.

nised that, in many cases, the medical condition of 'gender-dysphoria' is best treated by allowing for surgical intervention to provide people with biological organs more in keeping with their psychological convictions. Generally, those who have undergone such 'gender reassignment surgery' are termed transsexuals. People who identify principally with the 'opposite' sex but who have not undergone such surgery are generally known as transgendered.⁴ There are several thousand transsexuals and transgendered people in the UK, and there are many lobbying groups seeking increasing social and legal recognition of transsexual and transgendered people.⁵ In 1999 the UK government introduced the new Sex Discrimination (Gender Reassignment) Regulations 1999 (an amendment of the Sex Discrimination Act 1975), which outlaws discrimination against transsexuals on the grounds of their gender reassignment.⁶ Also during 1999 the Government set up working groups in both the House of Commons and the Lords to examine issues surrounding the legal treatment of transsexuals with a view to introducing further legislative change in the area. To date, however, these groups have not yet reported and no further legislative change has been made. The legal impediments, which most concern transsexuals, remain: that they cannot obtain a revised birth certificate in line with their 'gender-reassignment' and that they cannot marry as members of their re-assigned gender.

The distinction between queer practices and transsexual or transgendered practices is generally founded in the idea that the former type of practice are to some degree about deliberately 'fucking with' sex or gender roles, while the latter are about recognising the rights of certain people to be acknowledged as belonging to the sex or gender with which they most identify. Transsexuals and transgender people, in other words, are generally quite willing to accept the existence of definite sexual categories of 'man' and 'woman'.⁷ This is not to say, of course, that transgendered or transsexual people do not threaten traditional gender and sex roles, since they patently do by their desire to move from one seemingly natural sexual category to another. However, most accept that

⁴ See S. Whittle, *The Transgender Debate: the Crisis Surrounding Gender Identity* (South Street, Reading, 2000).

⁵ The largest of such groups is Press For Change, a London-based lobby and educational group that seek equal rights for transsexuals. The internet home-page for this group is <http://www.pfc.org.uk/>. A huge amount of material relevant to transsexual and transgender issues is available at this site.

⁶ An in-depth look at the merits and demerits of this legislation can be found in C. Burns, "Seven Out Of Ten, Must Try Harder" at <http://www.pfc.org.uk/news/1999/dfee-1.htm>.

⁷ See S. Whittle, "The Transgender Debate", *Supra* n. 4.

there are natural sex roles and thus remain firmly within a nature/culture dialectic that is paradigmatically modernist. Queer practices, contrarily, are post-natural, desire-fuelled, anarchic, performative, exploratory and experimental.⁸ They draw their character not from the acts performed, but from the transgressive performative brio with which the acts are carried off – “it ain’t what you do it’s the way that you do it, and if you do the same thing twice then you’re becoming straight”. Queer practices are about breaking the law, and queer individuals are sexual outlaws. The radical edge of transgendered and transsexual theory and practice is right here on the line of queer, for it does not seek recognition of the post-operative transsexual as a member of the new sex, but rather as precisely a transsexual; someone who used to be a man or a woman, and who is now a woman or a man, someone who chose at a certain point to switch, but who recognises the arbitrary nature of the initial distinction and thus who is really neither. Such a person is Kate Bornstein, author of “The Opposite Sex . . . Is Neither”!

Sex is fucking, everything else is gender’ Kate told us on the first day of gender school: a four part, sixteen hour Cross-gendered Performance Workshop which was part of Buddies in Bad Times Theatre summer school program. Kate is a Buddhist M-to-F transsexual performance artist and gender educator. Kate has been both male and female and now is not one or the other, but both-and-neither, as indicated in the title of her play *The Opposite Sex . . . Is neither*.⁹

Del LaGrace Volcano, photographer and performance artist, is another highly visible representative of the new trend in self-identification as ‘inter-sexual’:

Inter-sex is my true gender identity. It’s nothing more than a contemporary term for a hermaphrodite, because normally when you say that word people always think about mythological hermaphrodites, where you have both vagina and penis and breasts and the whole nine yards – or nine inches. In some ways I call myself inter-sex by design, because I don’t know if I am biologically qualified to be inter-sex. I just know I’m not transsexual – I fit

⁸ See for general introductions to the arena of queer theory, E. Kosofsky Sedgwick, *Performativity and Performance* (London: Routledge, 1995); E. Kosofsky Sedgwick, *Epistemology of the Closet* (Berkeley: University of California Press, 1990). For a more cautious approach to queer, see J. Butler, *Gender Trouble: Feminism and the Subversion of Identity* (New York and London: Routledge, 1990); J. Butler, *Bodies that Matter: on the Discursive Limits of Sex* (London: Routledge, 1993). In the legal field, see L. Moran, D. Monk and S. Beresford, eds., *Legal Queeries* (London: Cassell, 1998); C.F. Stychin, *Law’s Desire, Sexuality and the Limits of Justice* (London: Routledge, 1995).

⁹ Taken from “Kate Bornstein: A Transgender Transsexual Postmodern Tiresias”, interview with Shannon Bell, Pastiche Feminist Philosopher, http://www.ctheory.com/a-kate_bornstein.html#bio. See for a development of these ideas K. Bornstein, *My Gender Workbook: How to become a Real Man, a Real Woman, the Real You, or Something Else Entirely* (London: Routledge, 1998).

very few of the criteria – and I’m not gender dysphoric. The classic transsexual is someone who feels they are either a man trapped in a woman’s body or a woman trapped in a man’s body. I don’t, I feel like I’m a blend. I’m like a man, but I’m also like a woman.¹⁰

For those transsexuals who do not embrace this type of queer idea of what it means to be as a transsexual or transgendered person the management of their switch from one accepted gender or sexual category to another can create various problems, not the least of these being problems on which the law has some impact. In the law of the United Kingdom, with which this article is exclusively concerned, the principal prohibitions that remain for transsexuals are that they cannot obtain a change in their birth certificate in line with their sexual status, and that they cannot marry as a member of their chosen sexual status. The governmental argument in relation to refusals to allow changes to the birth certificate has been that such a certificate is simply a historical record and remains accurate even if there is a subsequent sex change. In relation to marriage there is no such argument to be made, and the government, on the occasions when it has been called to argue the justification for a prohibition on transsexual marriage, has argued that marriage is something which has traditionally been recognised as being between a male and a female, and even post-operative transsexuals do not fulfil all the necessary conditions to establish themselves definitely as a member of their assigned sex, namely that they are chromosomally still members of their original sex. It is at this point where the state takes a hand in the definition of what it is to be a man or a woman that the case of *Corbett v Corbett* comes into its own. While the definition of marriage as a union between a male and a female of opposite biological sex was inscribed in law in the Family Law Act of 1971, it was so inscribed as a direct result of the confusion occasioned by the *Corbett* case, and it was in that case, without the benefit of supporting legislation and with only scant relevant previous case-law, that the only detailed examination of this question was actually made in an English court. What is fascinating about the case is not so much the decision reached, but the manner in which the judgment was rhetorically organised in order to reach this decision.

CORBETT V CORBETT

The case decided the validity of a marriage ceremony that had taken place between Arthur Corbett and April Ashley, formerly George Jamieson. Mr

¹⁰ Del LaGrace Volcano, “Transgressions”, *Fluid Magazine*, July 1999. See also Del LaGrace Volcano and Judith ‘Jack’ Halberstam, *The Drag king book* (London: Serpent’s Tail, 1999).

Corbett asked for a declaration of nullity of the marriage, on the grounds that April Ashley was, at the time of the marriage, a person of the male sex. Alternatively, he asked for a decree of nullity on the grounds that the marriage was not consummated due to the incapacity or wilful refusal of April Ashley. April Ashley denied that she had been of the male sex at the time of the marriage and counter-claimed for a decree of nullity of the marriage on the grounds of the incapacity or wilful refusal of Arthur Corbett to consummate. Ormrod J, presiding, noted that this was the first case in which an English court had been called upon to decide the sex of an individual. He continued, however, that the case ‘resolved itself’ into a consideration of:

The primary issue of the validity of the marriage which depends on the **true sex** of the respondent; and the secondary issue of the incapacity of the parties, or their respective willingness or unwillingness, to consummate the marriage, if there was a marriage to consummate.¹¹

Right from the start, therefore, the judgment was cast as a search for ‘true sex’, it being presumed, without citation of authority, that this followed from the common law position. For determination of the ‘true sex’ of the respondent, the judgment was split into two identifiable evidential sections, followed by a concluding section. The first evidential section examined the history of the respondent leading up to her “so called sex change” operation, and the subsequent relationship between the parties to the case. The second involved the hearing of medical evidence on the sex of the respondent from several experts engaged by the court, the respondent and the petitioner. It is useful to examine each of these sections separately because of the differing emphasis in each.

Sexual History as Fantasy/Reality

As regards the examination of the history of the relationship between the parties, two themes can be identified as having been given prominence in the way that this history was presented. First, the degree of ‘reality’ as opposed to ‘fantasy’ that was said to be displayed in the relationship between the parties. Secondly, the extent of physical or ‘sexual’ contact that had occurred between the parties. At times the division between these two themes tended to blur since sexual contact or lack of it was taken as evidence of the lack of ‘reality’ in the relationship. Both revolved around the central idea of a comparison with normal heterosexual relationships and how they were conducted. The petitioner, who liked at times to dress

¹¹ *Supra* n. 2, at paragraph 35d.

as a woman, described his initial attraction to April Ashley as relying on her having achieved what he wanted for himself but could not have:

This was so much more than I could ever hope to be. The reality was far greater than my fantasy.¹²

The judge adopted the fantasy trope of the plaintiff and noted that:

This coincidence of fantasy with reality was to determine the petitioner's behaviour towards the respondent over the next three years or more.¹³

The petitioner characterised the progression of his own feelings as a movement away from fantasy and into the reality of "a full man in love with a girl"; he was attracted to her 'as a woman'. A relationship developed between the parties, but the judge noted that:

Listening to each party describe this strange relationship, my principal impression was that it had little or nothing in common with any heterosexual relationship which I could recall hearing about in a fairly extensive experience of this court . . . As a further indication of the unreality of his [the appellant] feelings for the respondent, it is common ground that he introduced her to his wife and family and quite frequently took her to his house or on outings with them.¹⁴

The judge was not convinced by the petitioner's account of events and characterises the relationship as being that of "a transvestite in love with a transsexual". Despite recognising the variety of heterosexual relationships that have come before his court he can see no way that this relationship can be recognised as such. The fantasy/reality theme continues in the judgment. Noting April Ashley's initial reluctance to marry Arthur Corbett, the judge commented:

I think that there can be little doubt that the petitioner was still in the grip of his fantasies and that the respondent had much more sense of reality.¹⁵

The moment at which, however, April acceded to Arthur's repeated requests of marriage was the moment at which she entered the realm of fantasy. When she ended the relationship, after the ceremony of marriage, by leaving Arthur and sending a letter outlining how unhappy she had been with him, this was interpreted by the judge as showing that, once again, "reality had broken in on her".¹⁶

The judge also noted that the lack of sexual contact between the parties, especially in view of the "extensive and varied sexual experience" of

¹² *Ibid.*, at paragraph 37i.

¹³ *Ibid.*

¹⁴ *Supra* n. 2, at paragraph 38g, h, i.

¹⁵ *Ibid.*, at paragraph 39e.

¹⁶ *Ibid.*, at paragraph 39j.

the petitioner, surprised him. Again this was offered by the judge as an indication of how ‘unreal’ the relationship was. The complete interlinking of the themes of fantasy/reality and sexual orientation characterises this section of the judgment. ‘Reality’ is equated with heterosexual normality and used as a normative standard against which to measure the ‘false’ of transsexuality. It is plain that the conceptual split between fantasy and reality is not made on a level that relates particularly to the individual acts of those involved in the case or against the easily available cultural reference point of two people who have a stormy relationship, decide to marry and realise too late that they have made a mistake. Rather, as the quotations above make clear, the split is made at the point where the love of a “transvestite for a transsexual” tries to pass as the love of “a man for a woman”. It is these medical/sexual identities, transsexual and transvestite, that are positioned as false in the true/false scheme constructed by the judge.¹⁷ To introduce the issue of the internal coherence of law as a system of rules, techniques and competencies, a final point must be strongly made in relation to this section of the judgment. Since the case was eventually decided solely on the biology of Ms Ashley and sex was outlined as residing solely in biology (for the purposes of marriage), then the entire history of the relationship between the parties is, in terms of the traditional view of law as a system of rules applied to relevant facts, legally irrelevant. The relevance of such a presentation of their history lies in the representation of transsexual relationships as false. Such a representation foreshadows and reinforces the rest of the decision; it serves to justify the conclusion that is yet to be delivered – a process of ‘narrative typification’ in action.¹⁸ It also draws on the reserve of ‘common-sense’ ideas of sex and sexual conduct as having to do with reality and falsity, with what is really deep down inside waiting to be revealed.¹⁹

¹⁷ The classic text dealing with the medicalisation of sexuality and the creation of medical/sexual identity types remains M. Foucault, *The History of Sexuality, Volume 1: an Introduction* (London: Allen Lane, 1979). The judge in this case might be said to have (quite reasonably) utilised such a medical organisation of knowledge on sexual issues. Less anthropomorphically it might be said that it was the discourse of sex as foundational truth that animated both the decision of the judge and the claim by April Ashley to be allowed to marry in her true sex. A Foucaultian reading would question which came first, sex or sexuality. The ‘always already’ nature of bodily construction through social (value-able) action is the focus of Judith Butler’s work in *Gender Trouble* and *Bodies that Matter*; see *Supra* n. 8.

¹⁸ See B. Jackson, *Law, Fact and Narrative Coherence* (Deborah Charles, Liverpool, 1988).

¹⁹ On the confessional truth of sexual nature as a matter of the history of ideas see Foucault, *The History of Sexuality*, *Supra* n. 17.

The Truth of Science and the Biological Truth of Sex

In the second evidential section of the judgment – much longer than the first – the judge turned to science to discover the ‘true’ sex of the respondent. Two main themes can be identified that run through this section. First, the idea of scientific knowledge as truth, and secondly, the idea of sex as a biological category discoverable through scientific evidence. Again these themes tended to intertwine throughout the judgment and were used to mutually re-enforce each other. The privileging of scientific knowledge in the case was evident even before evidence was assessed, in the way that the scientific evidence was incorporated into the judicial process. The court appointed two medical inspectors of its own to supplement the three each that both respondent and petitioner called. It is a rarity in the adversarial system that the court should call experts of its own rather than rely on counsel to do so. In this case, however, the experts were required to produce ‘value-free’ evidence on the condition of the respondent. Furthermore, with the approval of both sets of counsel, the judge allowed the expert scientific witnesses, appearing for both petitioner and respondent, to read out their evidence, rather than simply respond to questions from opposing counsel. The reasons given were that:

It is easier for scientific witnesses to give their evidence-in-chief in narrative form rather than on a question and answer basis. It enables them to express themselves in a form to which they are more accustomed, and avoids some of the pitfalls of the question and answer technique in which the form of a question may inadvertently condition the answer and lead to misunderstanding. It is easier also for counsel and the judge.²⁰

The countenancing of narrative performance by scientific professionals seems bizarre in that the narratives of the plaintiff are rejected as irrelevant in the face of biological fact, while the professionals are allowed narrative licence to establish biological facts, which are characterised as being unequivocally and foundationally true. The judge displays scant confidence in the ability of the truth to shine through the verbal thickets that might be placed in the way by clever lawyers. The scientific witnesses, however, represented either side of an argument and so, necessarily, disagreed on certain points. The first related to the classification of an individual as male or female. The medical experts all agreed that the same factors were relevant in deciding on sex classification. These were:

- (1) Chromosomal factors;
- (2) Gonadal factors (i.e. presence or absence of testes or ovaries);
- (3) Genital factors (including internal sex organs);
- (4) Psychological factors; and, in the opinion of some witnesses,

²⁰ *Supra* n. 2, at paragraph 42b.

- (5) Hormonal factors or secondary sexual characteristics (such as distribution of hair, breast development, physique etc., which are thought to reflect the balance between the male and female sex hormones in the body).

They also all came to the same conclusion on the biological condition of Ms Ashley, noting that she was of male chromosomal sex, male gonadal sex, male genital sex and psychologically a transsexual.²¹ Disagreement came at the point of deciding on an aetiology for transsexuality – some privileging biological factors and others psychological – and of stating which ‘overall’ sex April Ashley belonged to. One expert accounted for the differences of opinion by explaining that “We do not determine sex – in medicine we determine the sex in which it is best for the individual to live”.²²

Ironically, perhaps, it seems that at this point law and science exchange traditional roles. The law is eager to establish biological truth as a definite indicator of an essential sexual status, while the medical experts adopt a more pragmatic line, maintaining that the biological status is a factor to be taken into account in deciding which social sex the patient can best support. Assessing the scientific evidence Ormrod J noted that medical and legal definitions of sex are not necessarily the same and that the medical tests for sex determination are not decisive in law. They had been evolved by doctors – for the purpose of systematising medical knowledge, and assisting in the difficult task of deciding the best way of managing “the unfortunate patients who suffer, either physically or psychologically, from sexual abnormalities”.²³

He went on, however:

It is common ground between all the medical witnesses that the biological constitution of an individual is fixed at birth (at the latest), and cannot be changed, either by development of the organs of the opposite sex, or by medical or surgical means. The respondent’s operation, therefore, cannot affect her true sex. The only cases where the term ‘change of sex’ is appropriate are those in which a mistake as to sex is made at birth and subsequently revealed by further medical investigation.²⁴

The evidence of the medical witnesses is re-cast as an indication of ‘true’ sex, without any justification for the equation of truth with biology and in spite of the lack of agreement on ‘true’ sex amongst the witnesses themselves. On the matter of the development of sex organs of the ‘opposite sex’ having no effect on the biological constitution of a

²¹ *Ibid.*, at paragraph 46j–47a.

²² *Ibid.*, at paragraph 44d.

²³ *Ibid.*, at paragraph 44d–e.

²⁴ *Ibid.*, at paragraph 47b, c.

person we might here be bold enough to call Ormrod J simply (biologically) wrong. A more subtle point, however, relates to the relationship between law and science as arbiters of truth. This is brought out by Ormrod J's comments on the aetiology of transsexuality. He rejected the idea proposed by one medical witness, who cited recent research in animals, that hormones – biological agents – could shape the human sexual nature, saying:

[T]he extrapolation of these observations of the instinctual or reflex behaviour of animals to the conscious motives and desires of the human being seems to be, at best, hazardous. The use of such phrases as “male or female brain” in this connection is apt to mislead owing to the ambiguity of the word brain. In the present context it refers to a particular group of nerve cells, but not to the seat of consciousness or of the thinking process. In my judgment these theories have nothing to contribute to the solution of the present case.²⁵

The scientific evidence here is structured and assessed in terms of an opposition between the physical and the psychological, the body and the mind. The ways in which transsexuals trouble such a division are suppressed in favour of the acceptance of the scientific (and common sense) categories – the experience of transsexuals as “being a woman in a man's body” in neatly packaged into “psychologically female, physically male”. There is, thus, a double filtering process at work, which converts the social reality into scientific terminology and then disqualifies the social science of psychology in favour of the physical science of biology. Psychology, in this legal instance, acts as a vector to carry social reality to a point where it can be pushed aside by a superior science. It may affect the conscious desires and motivations of people but it does not affect their true sex.

The investigation of the scientific aspects of the case occupies seven pages of the judge's decision. The social aspects, by contrast, were summed up with the cursory comment that the respondent was living “more or less successfully” as a woman. This was immediately undercut by the analysis of such success as due to an initially convincing ‘pastiche of femininity’. Ormrod J noted that:

Her outward appearance, at first sight, was convincingly feminine, but on closer and longer examination in the witness box, it was much less so. The voice, manner, gestures and attitude became increasingly reminiscent of the accomplished female impersonator.²⁶

This analysis harks back to the reality/fantasy theme of the first section of the judgment, which was used to place the relationship between the parties in the realm of fantasy and so to make irrelevant the questions that

²⁵ *Ibid.*, at paragraph 43–44.

²⁶ *Ibid.*, at paragraph 47b.

it raised about the social aspects of sexual identity. The social aspects of the case are characterised as fantastical, deprived of space in the judgment and, finally, ridiculed by the judge. Science and the social are presented as opposites in this section of the judgment. By excluding conflicting evidence and presenting scientific evidence as true, the decision is framed in such a way that science will necessarily provide the truth of sex. The truth that it provides, with a little help from the judge, is that sex is biological, rather than psychological or social. Transsexuality is psychological and therefore, in some sense, untrue.²⁷

The Biological Marital Bed

In the final section of the judgment Ormrod J applies legal principle to the 'facts' that have been established in the two preceding sections. Beginning the concluding section he states:

The fundamental purpose of law is the regulation of the relations between persons, and between persons and the state or community. For the limited purposes of this case, legal relations can be classified into those in which the sex of the individuals concerned is either irrelevant, relevant or an essential determinant of the nature of the relationship.²⁸

According to the judge, sex is completely irrelevant in relation to most tortious or contractual relations, and in most matters relating to the criminal law. It is relevant to some aspects of the law relating to employment provisions and to state run pension schemes, but not essential, since the parties to a contract of employment or a pension scheme can agree that it may be made irrelevant. However, along with rape, adultery, and gross indecency, marriage is essentially determined by the sex of the participants.²⁹ In a statement that lies right at the heart of the judgment the

²⁷ The discourse of sex-as-truth is shared by many of the other actors involved in the case, notably the two protagonists, Ms. Ashley and Mr. Corbett, although they would locate the truth of sexual personhood elsewhere than does the judge. It is this discourse or idea of sex as an essential essence of being discoverable at some point, through its command of the allegiance of the principal actors that animates and underpins the entire decision, rather than the individual 'personality' of the judge. The comment should be made, however, that it seems singularly ironic that a biological male, who is constrained to dress in a gown and wig for the sake of cultural traditions, should fail to recognise the value of the external appearance of things. The costume of the judge defines the cultural position of that judge, whatever the biology of the wearer. The judge however does not recognise the correlation between his own position and that of anyone who wears clothes traditionally associated with one sex or the other. In this case he seeks to probe beneath the surface to the biological 'truth' below.

²⁸ *Supra* n. 2, at paragraph 48b.

²⁹ The Criminal Justice Act of 1994 has changed this situation in respect of rape, which is now defined as to include forcible penetration into all bodily orifices with objects.

judge elaborates on the legal relationship between sex and marriage and gives his decision on what constitutes the sex ‘woman’ for the purposes of marriage:

Sex is clearly an essential determinant of the relationship called marriage, because it is and always has been recognised as the union of man and woman. It is the institution on which the family is built, and in which **the capacity for natural heterosexual intercourse is an essential element** . . . The question then becomes what is meant by the word ‘woman’ in the context of a marriage, for I am not concerned to determine the ‘legal sex’ of the respondent at large. Having regard to the **essentially heterosexual character** of the relationship which is called marriage, the criteria must, in my judgment, be biological, for even the most extreme degree of transsexualism in a male or the most severe hormonal imbalance which can exist in a person with male chromosomes, male gonads and male genitalia cannot reproduce a person who is naturally capable of **performing the essential role of a woman in marriage**. In other words the law should adopt, in the first place, the first three of the doctors’ criteria, i.e.: the chromosomal, gonadal and genital tests, and, if all three are congruent, determine the sex for the purpose of marriage accordingly, and ignore any operative intervention. The real difficulties, of course, will occur if these three criteria are not congruent. This question does not arise in the present case and I must not anticipate, but it would seem to me to follow from what I have said that **greater weight would probably be given to the genital criteria than to the other two**.³⁰

It may seem odd that there should be a meeting of true minds between Kate Bernstein, in “A Transgender Transsexual Postmodern Tiresias”, and Mr Justice Ormrod, but in the matter of sex it seems that both can be firmly held to their printed opinions that sex is fucking, everything else is gender. The passage above consists of a series of assertions that are organised to support each other but that rest on unestablished premises. The whole amounts to a remarkably bald promotion of the link between heterosexual intercourse and marriage. Biological classification of sex in terms of chromosomes, gonads and genitals is drawn as a necessary conclusion from the assertion that a woman for the purposes of marriage is someone who has the natural capacity to perform heterosexual intercourse. This link between heterosexual intercourse and marriage is, of course, already inscribed in the law since marriage must be consummated to avoid being voidable. What precisely the natural capacity mentioned above consists of is further elaborated on in a passage which deals with the issue of whether this marriage – if it had been found to exist – could have been consummated. He states:

I would, if necessary, be prepared to hold that the respondent was physically incapable of consummating a marriage because I do not think that sexual intercourse, using the completely artificial cavity constructed by Dr Burou, can possibly be described in the words of Dr Lushington in *D-E v A-G* (falsely calling herself D-E)³¹ as ordinary and

³⁰ *Supra* n. 2, at paragraph 48f–i – emphasis added.

³¹ *DE v AG* (1845) 1 Rob Eccl 179 at 298, 299.

complete intercourse or as “vera copula of the natural sort of coitus”. In my judgment, it is the reverse of ordinary, and in no sense natural. When such a cavity has been constructed in a male, the difference between sexual intercourse using it, and anal or intra-crural intercourse is, in my judgment, to be measured in centimeters . . . The mischief is that, by over-refining and overdefining the limits of ‘normal’, one may, in the end, produce something altogether different from sexual intercourse.³²

Ormrod J, in order to come to this conclusion of the issue of consummation, had to distinguish the earlier case of *S v S*.³³ This case had decided that a woman who had had her vagina artificially enlarged was capable of consummating marriage after such an operation. The presiding judge in that case, Willmer J, had also made various dicta indicating that a completely artificial cavity would suffice for this purpose. His reasoning was that if an artificial cavity did not allow sexual intercourse then a person with such a cavity would be incapable of committing adultery or of being raped. Such possibilities he regarded as “bordering on the fantastic”. Ormrod J mentioned the issue of adultery but dismissed it as unimportant. He did not deal explicitly with the much more problematic area of rape, yet earlier in the case he had said that in certain areas of the law sex was a determining factor and rape was mentioned at this point. Presumably he was therefore aware that his judgment was also deciding that post-operative transsexuals could not be raped. This remained the case until the law was changed by the Criminal Justice Act of 1994. He distinguished *S v S* on the grounds that in that case the artificial cavity was constructed in a woman whereas in this case it was constructed in a man. Dealing with the objection that it would be logically inconsistent to allow people to be classified as one sex for some purposes and as another sex for the purposes of marriage he noted that:

The illogicality would only arise if marriage were substantially similar in character to national insurance and other social situations, but the differences are obviously fundamental. These submissions, in effect, confuse sex with gender. Marriage is a relationship which depends on sex and not on gender.³⁴

What is meant here by gender is not elaborated upon. In the context of transsexuals it obviously means the social sex role that they play, which is not grounded in a biological reality. The female gender, which does not relate to the natural functions and capacities of woman in marriage i.e.; heterosexual intercourse and what can be achieved by their gonads, chromosomes and genitals, is something that can be achieved by transsexuals.

³² *Supra* n. 2, at paragraph 49h–i.

³³ *S v S* [1963], P 37.

³⁴ *Supra* n. 2, at paragraph 49c.

The judge in the final part of the decision, which rationalises into narrative form the rest of the trial process, establishes a series of conceptual links and oppositions. He links the concept of biological sex, as identity of the person, to legal sex, as something that has to be decided for the purposes of marriage, to heterosexual sex, as an act, to the natural and essential role of woman in marriage, as performing heterosexual sex. The other criteria for sexual determination that were proposed in evidence i.e.: the psychological criteria, are thus linked to non-essence and non-naturalness and so removed from relevance to 'natural' sexual practices. The piling up of conceptual linkages is enough to smother the contentious issue of what exactly 'natural' is when it comes to transsexuals. Reality in the first section of the judgment and scientific biological truth in the second, line up alongside biology, as an essential determinant of sexual nature, heterosexual sex as the natural expression of this nature, and heterosexual sex as the essential role of woman in marriage. In the face of this series of 'real' linkages an opposition series of 'false' linkages is created: fantasy in the first section is implicitly identified with non-scientific knowledge, non-heterosexual sex and, to an extent, psychology – which enters into consideration to be characterised as inferior to biology/physicality, but at least is given consideration in a way that the 'social' aspects are not.

However, despite the coherence of the decision, in the sense that it is apparent what is being equated or connected with what and for what reason, the overall structure of the judgment – both conceptual and in terms of the narrative organisation – emerges as paradoxical. The decision is eventually made on the basis solely of biological considerations and yet the judgment begins with a detailed examination of the personal histories of those involved. At the same time as this personal history is made active through its characterisation as 'fantastical', so that it can serve to illustrate that April Ashley was not a real woman acting out her biological nature but rather a 'female impersonator', the social role-playing aspects of 'gender' are said to have nothing to do with a decision on sex for the purposes of marriage. In the second section scientific evidence is characterised as truth, yet the scientific experts are allowed space to narrate their evidence on the grounds that the question and answer form might lead to confusion. Despite the differences of opinion of the experts and the stated position that they decide on which sex a person can best socially support, rather than which sex they really are, their evidence is formulated into the truth that 'true sex' is fixed by birth at the latest. This is done in the same moment that the priority of legal sexual classification over medical classification is noted, in the matter of legal marriage. In the third

section the paradoxes of the first two are gathered together so that 'true sex' is linked, along the genitals, to biology and heterosexual intercourse on which marriage is said to rely, because it is the natural and essential function of a woman in marriage. The result is that the decision appears confused and self-contradictory at many points.

The idea that marriage is considered very definitely the preserve of heterosexual men and women emerges strongly, and the novelty of the case means that the case is more obviously decided on 'moral' grounds than cases resolved through an appeal to the established self-legitimation mechanisms of precedent and authority. Yet the attempt to link this legal truth to a 'naturalness' of heterosexuality and a foundational, biological essence of men and women is unconvincing. The impression which results is that it was more important that a line should be drawn, which would preserve the ideal of marriage as a heterosexual institution, than that the line drawing exercise should marry with a truth outside the law itself. Taking together the three criteria (genital, gonadal and chromosomal) laid down by *Corbett* it seems obvious that the decision acts as not only a support to marriage as organised around the imperative of heterosexual sexual activity, but also that the 'normal' family of heterosexual parents plus children is being safeguarded. This line that was drawn in *Corbett* has managed to survive for 30 years and, perhaps just as interestingly, has managed to mutate considerably during that period. While Ormrod J stated that sex was rooted in biological considerations of which he considered the genital to be most significant, *Corbett* is generally taken, in subsequent cases and in academic treatments of this area, to have established a chromosomal legal test for sex. The original paradoxes and contradictions of the case have become buried by time and by the authority of the position of the decision. A genital test has been sanitised and complicated into a chromosomal test and transsexuals remain unable to marry.

Two major secondary themes emerge from this judgment. The first is the tremendous work that has to be done in this context in order for the law to conclude a point about the nature of nature. The court calls into evidence both hard and soft sciences but eventually elects simply to enforce the idea that nature, with regards to sex, means two categories of men and women that are capable of performing heterosexual intercourse with each other – this being a pre-condition of actually performing such intercourse, which is a requirement for a fully valid marriage. The second theme is that of the disqualification of the identity of one of the participants in this trial; it is not simply that the remedy of the court was denied, but it was denied in terms that characterised the person claiming to be a woman as a fantasist, as someone who did not have a reality to the way that they lived. The element

that ties these themes is the willingness of the law, if we take the judge on this occasion to embody the law, to reduce a complex set of emotional and practical circumstances down to the measurement of a series of acts, and ultimately to the measurement of the most biologically irreducible elements, which are completely beyond the control of the participants. Law is all about acts, there is no priority of the idea of love in this judgment, there is a translation of love into a series of acts; was there this act or not? It is on this basis that several critiques of this judgment and of the subsequent legal consequences have been launched; where is the justice in dealing with relationships, which are surely about love, in terms of bald acts to which one is not permitted legally to attach emotional significance. More generally, such a field of legal decisions in relation to sexual and emotional issues has opened up a critical field of enquiry into the role of institutional law as being able to provide justice beyond a simple scientific measurement of activity followed by an attribution of responsibility.

CONCLUSIONS

Ten years ago it seemed a valid exercise to point out that there was a lining-up of elements in the way in which transsexuals seemed to see themselves, in the way that the law dealt with them and in the way that academic reaction dealt with the legal treatment of transsexuals. It seemed valid to say that there was no reason for there to be such a convergence of orientation towards the issue of what it was to be a transsexual, and that one way of getting away from this would be for the academics at least to look to a social constructionist pattern of sex formation and, thus, to question the legitimacy of the sexual categories that were being proposed at all levels of the chain (self-perception, legal treatment and academic reaction). Another way of dealing with this issue would have been, as was the principal orientation of a lot of critics of transsexual treatment by the law, to look to medicine and to point out that there was a spectrum of sexual beingness that resisted categorisation into two strictly opposed unities; it was a legal rather than a biological reality that forced people to be of one sex or the other. Medicine did not create or alter the sex of a person, but simply made a judgment about which social sex a particular person could best support, given the range of sexual and social characteristics that they displayed or were prepared to perform.

Now there is much more looseness at each of the three stages of the chain mentioned above. There is a far wider diversity of self-perception and self-representation obvious within transsexual literature. It is accepted that to be transsexual does not correlate with being heterosexual, but that

transsexuals can and will display an equally extensive range of sexual and desire beingness as people who have not gone through sex-change surgery. Transsexuals may be straight, gay, bi, queer, celibate, whatever. The range of transsexual self-descriptive literature is wide enough to embrace the idea that transsexuals are caught in a system where they have to choose to be one or other sex, given the way in which society is organised. There is a strong self-descriptive transsexual literature maintaining that it would be healthier for all concerned if society were to recognise the entire spectrum of sexual beingness and to legislate accordingly (most probably in a much more sex-blind way), but since there is no such recognition and since 'normal' heterosexuals have the choice to be male or female (and happen to exercise this choice appropriately – in line with their external appearance) then why should transsexuals not have the same choice? Transsexuals, at least some of them, are willing to side-step the issue of the absolute reality of their sexual condition and make sexual condition into as much a matter of choice within the limited parameters fixed by a wider society as it is of destiny. One edge of this kind of self-presentation by transsexual people is well illustrated by those such as Kate Bornstein (author of 'Gender Outlaw') who present themselves explicitly as transsexuals, rather than as members of their original or new chosen sex. Having arrived at this point the question remains of how the institutions of law should deal with this natural law of becoming, which has substituted the settled patterns of male/female sexuality and love relationships. Not only has the boundary been crossed but increasingly the boundary is being technologically dissolved. If law has patterned its responses to love – in terms of the regulation of family conduct, the sexual relations between individuals, what has been regarded as criminal in terms of sexual conduct – around the binary of male and female, then what is the correct form of response now? The new law of sexual subjectivity is self-experimentation and self-creation to the limits of available technologies and the limits of the imagination. It is an aesthetics of sexual identity, while institutional law remains within the bounds of judgment according to act against a background of supposed natural features of the sexes. The answer is that law has to incorporate the materiality provided by sociological versions of what love and sexual relationships are all about in these times, without giving itself totally over to a judgment through sociology – which would amount to a judgment against the background of nothing, since sociology can only observe. The judgmental faculty of law must be drawn from self-recognition of law as a form of literature in its own right, that is, law must recognise the value of its pronouncements on a much deeper level than merely the social consequences (of imprisonment, property division etc.).

The law keeps justice alive, if it does at all, as a species of poetry, not as a species of science. The form of the legal presence is what is important, the reality of its imaginative recreation of circumstance within a text that must be publicly announced as a means to instruct a people. The weapons which law has in its struggle to maintain an allegiance from a people in the face of increasing inroads made by a new merger of social and natural science, underneath an umbrella of cybernetics, are theatre and poetry; the liberty of the imagination that does not follow the path of yet more plus or minus choices, but the promotion of shades of meaning irreducible to a coded pattern but which amount to a justice of fulfilment. If the topic at issue is marriage, and who should be allowed to marry, then a circular consideration of marriage as open only to original men and women and a search for the truth of these categories within crude biology is completely inadequate.

*Department of Sociology
University College Cork
Cork
Ireland*

